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SUPREME COURT

OF THE

UNITED STATES.

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OCTOBER TERM, 1906.

No. 143.

THE AMERICAN SMELTING AND REFINING COMPANY,
Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF COLORADO EX REL. HENRY A. LINDSLEY, District Attorney for the Second Judicial District of the State of Colorado,
Defendant in Error.

Error to the Supreme Court of the State of Colorado.

REPLY BRIEF OF PLAINTIFF IN ERROR.

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The very limited time that intervenes between the service of the brief for defendant in error in this cause and the date set for its final argument before this Honorable Court does not suffice for the preparation and printing of more than a very meager and succinct reply to the brief of defendant in error.

At the very outset of our reply we beg to say that, with all respect to the Honorable Attorney General for the State of Colorado, his brief cannot be relied upon when purporting to state the contentions made and propositions relied upon by the plaintiff in error. Said attorney general in his brief does not, in any instance, exactly or accurately state or reproduce any of the propositions or contentions formulated on behalf of the plaintiff in error. Instead of meeting those propositions squarely he paraphrases or reformulates them, and then undertakes to answer them as so remodeled by him, although such remodeling in every instance makes the proposition which he then proceeds to answer radically and materially different from the proposition as advanced and contended for by the plaintiff in error.

As the quickest (though, if time permitted, perhaps not the best) method of reply we will follow the order of subject and discussion appearing in the brief for defendant in error, to-wit:

The Nature of the Tax.

By the law as applicable to the Colorado statute under discussion, as well as by the express statements and admissions of the opinion of the Colorado Supreme Court and of the Honorable Attorney General of Colorado in this cause, it is clear that the

exaction, contemplated by Sections 64-6 of the Revenue Act of March 1902, must be assigned to one of the three following classifications, to-wit: 1. A *bonus* or conventional price "for the right, privilege or franchise *to do business as a corporation* in the State of Colorado; 2. A tax upon *property*, tangible or intangible; or 3. An occupation or business tax.

1. *Bonus or Conventional Price for the Franchise, Right or Privilege to do Business as a Corporation in the State of Colorado.*

It is to this classification that plaintiff in error contends, and has always contended, that the exaction, contemplated by the statutory provisions under consideration, must be assigned; but it is not necessary in this Reply to elaborate the discussion upon this proposition, since it has already been fully elaborated in the principal briefs for plaintiff in error. The Colorado Supreme Court and the distinguished counsel for the defendant in error clearly concede that, if this exaction is properly assignable to said classification or character, the statute cannot be sustained; and the main strength of the argument of Colorado's Supreme Court and its Attorney General is directed to an attempted demonstration that such character or classification cannot be assigned to said exaction.

It seems to us wholly incomprehensible what rule of language or logic the Colorado Supreme Court resorted to in arriving at a conclusion which gives a diametrically opposite meaning and effect to two statutes whose language, (so far as affects the

exact question under consideration), is as nearly identical as possible without literal repetition. Notwithstanding the substantial identity of the language used in the two statutes, the Colorado Supreme Court holds that the one statute imposes an arbitrary conventional price for a right or privilege to do business, and the other imposes an occupation tax upon the particular business engaged in.

Speaking of the payment made by the plaintiff in error, under the statute which was in force when it first came into the State, (see Appendix to our principal Brief, pp. 66-7),—the Colorado Supreme Court says:

> "It is the conventional price or bonus which the corporation pays to the state for the privilege of coming into this state to do business as a corporation, subject to all legitimate taxation, etc."

And further on:

> "We have already held that this filing fee was the conventional price for appellant's right of entrance as a corporation, and when paid, merely entitles it to come into this state to do business as a corporation, etc."

Then the Supreme Court proceeds with an attempted differentiation of the *right*, which the corporation obtained by the original payment, from the *right* for which payment is demanded by Sec. 65 of the Act of March 22, 1902; and finally holds the latter to be "a tax on *the* business of foreign corporations."

This at once suggests a comparison of the two statutes. The first (see pp. 66-7 of our principal Brief) provides:

> "No such"—a foreign—"corporation, joint stock company or association shall * * * be permitted to do any business in this State until said fee shall have been paid."

The language of the second (§ 65, p. 6 of our Brief) is:

> "Every foreign corporation * * * shall, * * * as a condition precedent to its right to do any business within the limits of this State, pay annually, etc."

Is not the language of each of these statutes the exact equivalent of the other? If said statutes were being interpreted solely by the language used in them, and without reference to a pending controversy or to a particular state of actual facts, would not the natural conclusion be immediate and unhesitating that they are exact equivalents, the one of the other, and that the burden imposed by each is of exactly the same kind, character and class?

Under such language in the statutes, if the first was an arbitrary "bonus or conventional price for the right to do business" in the State, then so must the second also be. If the first is in purchase of a *right*, then, under the language of Sec. 65, the second cannot be an occupation tax on the particular business followed, but is also a price demanded for the *right* to do business as a corporation.

But the Colorado Court plants its decision squarely and alone upon a holding that the later statute imposes only an occupation or business tax, and therefore this Reply will be mainly addressed to the law which determines and controls "occupation taxes."

2. *Property Tax.*

Although repeatedly and emphatically asserted by the distinguished counsel for defendant in error and also by the Colorado Supreme Court in its opinion, plaintiff in error does not, and has never contended, that the exaction or burden attempted to be imposed by said statutory provisions is properly or legitimately "a property tax." The contention of the plaintiff in error is, and has always been, that it can be only properly and legitimately construed to be an arbitrary "*bonus* or conventional price" for the franchise, right or privilege *to do business as a corporation* in the State of Colorado.

But plaintiff in error has contended, and still contends, that, if by any legitimate construction or legally permissible interpretation of these statutory provisions, the exaction contemplated does not come within and belong exclusively to the classification first above defined, then, under the peculiar language of the Colorado Revenue Act of 1902, this exaction must be considered "a property tax"—a tax upon intangible property—upon the franchise and privilege to do business as a corporation in the State of Colorado. And in the discussion of the next subheading we will make exact quotation of unqualified statements, made by the Colorado Supreme Court

and also by the brief for defendant in error, which, if accepted as correct, absolutely demonstrate that this is "a property tax;" and, being such, is imposed upon a subject of taxation which has been already, at least once, taxed under previous provisions of the Colorado Revenue Act of 1902. (See our printed brief for plaintiff in error, pp. 68-71.)

The brief for defendant in error devotes considerable time and space to an attempted distinction between taxes upon "property" and taxes upon "franchises." A detailed reply to these portions of the brief for defendant in error is unnecessary; for the aforesaid provisions of the Colorado Revenue Act of 1902 clearly shows that such distinction has been wholly obliterated and no longer exists in the State of Colorado.

Under the complicated and diverse forms of the statutes of the several States it necessarily follows that what is included in the term "property tax," *varies* with the respective constitution and statutes of each particular State determining what constitutes "property;" and it cannot be denied that any tax which is imposed directly upon "property" is "a property tax." From this it logically and legally follows that the constitution and statutes of each State must be considered in determing the exact intendment and effect each decision turning upon this point, and how far they are pertinent and influential precedents upon a similar question, arising under the constitution and statutes of another State.

From the dawn of modern civil government down to within the last few decades, the term "property," for the purpose of taxation,—*i. e.*, "taxable property,"—covered only visible and tan-

gible property, to-wit: Realty, on the one hand, and Personalty,—*i. e.*, chattels,—on the other hand. Up to that time all actual values were embodied in such *tangible property*, and substantially all profits from the ownership and use of property could be directly traced to *tangible property*.

Within the last forty or fifty years, however, new avenues of business have opened up and new methods of business adopted; until during the last few decades the larger proportion of profits have arisen from things which were *intangible*, and more or less incapable of satisfactory definition, but which were, nevertheless, recognized to be of vast actual material value.

Consequently, there has been a constant effort on the part of the taxing power, and of the courts in aid of the taxing power, to reach these *intangible things* and to have them recognized as taxable. Up to the present, in all American jurisdictions, this purpose has been sought to be effected by imposing some of the burden for revenue purposes on "franchises" and "privileges," having an evident value, —and thus have arisen what in many of the decisions are spoken of as "franchise" or "privilege" taxes, as contradistinguished from "property taxes," or taxes on tangible property. Many of the States have not yet crystalized this extension of the subjects of taxation into the form of *taxable property*, so that they can be made subject to *property taxes*. Some of the States, including Colorado, have endeavored, with more or less success, to make *these intangible things* have the character and distinctiveness of *property*, and have adopted constitutional provisions and enacted statutes with that end in view; so that

to-day, in many of the States, *of which Colorado is one*, "franchises," "privileges," and other intangible things, of evident value and profitableness, have been brought within the term "*property;*" and taxable property has been made to include, not only tangible property as theretofore, but also to cover those *intangible things* of value, to bring which within the scope of taxation, has heretofore taxed the ingenuity of legislatures and courts.

When any of these intangible things have by statute been made to take on the character of *property* and to be taxable as such, there is patently no longer any need *or justice* in continuing the former idea that they must be reached for taxation by some special method and designation other than by "a property tax."

Furthermore, being under such statutes taxed *as property*, it is no longer reasonable or just that they should be taxed again under the designations or classifications, under which they were subjected to taxation previous to the time when they could be included in the designation "property." To enforce the *new* classification and also adhere to the *old* classification evidently and necessarily results in double, and therefore unfair, taxation, and unequal protection of the law.

Under the Colorado statutes "taxable property" to-day not only includes the *tangible property* of the past, but also *intangible property* having an evident and more or less ascertainable value, and heretofore designated as "franchises," "privileges," "powers," etc.

To determine then whether a tax upon these valuable *intangible assets* is "a property tax" it is not

sufficient or fair to turn decisions and statutes under which the only things taxable as "property," and the only things included in "a property tax," were *tangible* and visible things.

It would be interesting and instructive in the present case to examine the constitution and statutes of the several States of this Union; and it will probably surprise the court, as it has ourselves, to find, upon such an examination, that, under the respective constitutions and statutes of a very large number of the States, "property,"—for the purpose of taxation, "taxable property,"—still includes, by the express terms of said statutes, *only* tangible and visible things; and, therefore, it is not surprising to find that, in the decisions of such States, a tax levied upon these intangible things of value are still given a specific designation as, for instance, "franchise" taxes, "privilege" taxes, etc., and a distinction made between these and strictly "property taxes."

To the present condition of the constitutions and statutes of the several States in this respect, *Cooley on Taxation* (3rd Ed.), devotes considerable space, pp. 274-342.

It becomes pertinent, therefore, in determining what *in Colorado* constitutes "a property tax," to study carefully the *exact terms of the Colorado revenue statute*, and at the outset we desire to call attention to the fact that formerly, and during the period when the decision was made by the Colorado Court in *D. C. Ry. Co. v. Denver*, 21 Colo. 350,—the Colorado revenue statutes were, and until within the last few years remained, of such character that "property" and "a property tax" included *only tangible property;* and that "*intangible property*" could not

be reached under such designation or classification.

But under the late Acts of the Colorado legislature, culminating in the revenue statute of 1902, the scope of the term "property" has been very much enlarged so as to bring within that designation *intangible property* as well and all those things which, though not visible and tangible, have an evident, and more or less ascertainable, value. Under such a statute "property," and "a property tax," now include these *intangible things*, which were theretofore unsusceptible of direct taxation as *property*, and which previously had to be reached for revenue purposes under the guise of "license," "franchise," "privilege" taxes. A decision now, which disregards these intangible things *as being property*, which holds them not embraced within the designation "taxable property," and adjudges a tax upon them to be not "a property tax," is inapplicable and not in logical or legal conformity to the law as it stands in this Act of 1902.

See,—§§ 2, 13, 14, 15, 16, and 61, of the Act of 1902 set out in the Appendix to our principal brief, pp. 69 to 71.

Under such a statute the terms, "property" and "property tax," are very much enlarged and include, not only as theretofore tangible property, but also *intangible property;* and the latter, *under the express terms* of the statute, includes all the "franchises," "privileges," "powers," etc., belonging to a person or corporation. Therefore that which theretofore could not properly be designated, "property,"—that which was therefore susceptible of no other designation than that of "a franchise," "a privilege," is to-day as much included in the

term "property,"—and a revenue imposition thereon is as much included within the term "a property tax,"—as is real estate and chattel property, or the taxes imposed thereon. The franchise *to be* a corporation thereby becomes *property* and a revenue imposition upon it *a property tax;* so also the franchise or privilege *to do business* within the State: So also the capital stock of corporations: And so on throughout the entire list of "franchises," "rights," "privileges," "powers" and other *intangible* things of value, which therefore did not come within the term "property," and which, therefore, were not susceptible of "a property tax."

If, then, what was theretofore merely a franchise, right or privilege, insusceptible of direct taxation, as "property," is by the express terms of the statute made "property" for taxable purposes and subjected to a "property tax," it cannot be subjected to a second and entirely independent tax under its old designation of "franchise" or "privilege" tax. And it logically and legally follows that decisions, which turn upon the point that such things were *not property* and not susceptible of taxation as *property*, are not pertinent or controlling in a case arising under a statute by which the same things are *expressly made "property,"* required to be included within the term "property," and subjected to taxation as such.

It is therefore unnecessary and immaterial to the present case to review the numerous authorities referred to in the brief for defendant in error where "franchises" and "franchise taxes" are distinguished from "property" and "property taxes," and taxation upon the former upheld.

3. *Occupation Tax.*

Clearly conceding that the Colorado statutory provisions under consideration cannot be sustained if the exaction therein contemplated comes within either of the classifications just above stated, the Colorado Supreme Court and the defendant in error assert that the enactment is nevertheless valid because, as they hold and assert, it is "an occupation tax,"—a tax upon "THE business of corporations."

Just here we urge upon the Court's attention the unusual importance and effect of the presence or absence of that little orthographic particle,—"the Article,"—before the word "business," in the statute itself and in the discussion thereof by the Colorado Supreme Court and by the defendant in error. In the statute, neither the definite nor the indefinite Article is used preceding the word "business." In the opinion handed down by the Colorado Supreme Court and in the argument for defendant in error, one or the other of these little "parts of speech" is *invariably used* when the effort is made to give to this exaction the character of an occupation or license tax.

[It may be assumed that in all quotations hereinafter made from the opinion of the Colorado Supreme Court, the brief for defendant in error, or from authorities cited, the *italics* are ours.]

The Colorado Supreme Court says (Trans., p. 58, fol. 126):

> "We hold that the tax authorized by Section 65, called a license tax, is, in form of an excise, a tax upon *the* business of for-

eign corporations and is levied for the purpose of State revenue."

And, again (p. 64, fol. 137):

> "We are satisfied that this corporation license tax is on *the* business of foreign corporations which are established and doing business in this State."

In the brief of defendant in error it is said (p. 11):

> "This tax is undoubtedly assessed for *the privilege* of carrying on business."

If we accept this statement as correct, then it necessarily follows from Sections 2 and 13 of the Revenue Act of 1902 (brief for plaintiff in error, p. 69), that "the privilege," subjected to this tax, is "property" and has already been taxed as "property" for its full value.

Furthermore, if this tax is assessed for the privilege of carrying on business"—*note the absence of any and all qualifying particle or phrase*,—then, it cannot be a tax on the occupation or *the* business which is carried on.

Again, the brief for defendant in error, after quoting Sec. 13 of said Act, asserts (p. 15):

> "When a foreign corporation files its charter in the office of the Secretary of State of Colorado, and complies with certain laws governing its admission, it acquires the right to do business for the period of twenty years, subject of course to any law

qualifying this right. *This right to do business is a franchise or power.*"

If this assertion is accepted as correct, then "this right to do business" is *property*—intangible property—and taxed as such by said Section 13. Furthermore, it is property acquired and fully paid for by, and absolutely vested in, the corporation upon the doing of the acts mentioned in the above quotation.

Immediately following the above statement and concession, the brief continues:

> "But we insist that the corporation cannot exert this right or power to do in *any particular* business, and thus exempt *the* business from taxation. Business, trades or occupations are distinct subjects of taxation and are not included in sections 13 to 15 inclusive. The matters mentioned in these sections affect persons as well as corporations. No one would claim that by virtue of these sections an individual could escape paying a tax for the privilege of conducting *a* business, trade or profession, or that a liquor dealer could escape paying a license tax."

And on page 21, it is said:

> "The power 'to do' and *the* business of the corporation are distinct subjects of taxation."

Here the distinguished counsel for defendant in

error—inadvertently it would seem—states correctly the law or criterion by which it is to be determined whether the tax imposed is an occupation tax. In order to constitute a tax, an occupation tax, or a business tax, the "particular business" subjected to the tax must be expressly specified by the law imposing the tax, or be ascertainable by clear and necessary legal inference therefrom.

An infallible and essential test, of whether a law imposes a business or occupation tax, is the ability of the interpreter to put his finger with absolute certainty upon *the business or occupation*, which is subject to the tax. It is beyond controversy that *the* business or occupation engaged in is entirely distinct and separable from the *right*, franchise or privilege *to do business*. The latter is unquestionably taxable under this revenue act as "intangible *property*," and, as demonstrated in the opinion of the Colorado Court in the *Parsons case*, is entirely distinct and independent of the business which may be conducted under such general right, franchise or privilege: the former may by proper methods be taxed in addition to and simultaneously with the latter. In order, therefore, to properly hold a tax to be "a tax on an occupation or a business," the court must be able, *from the terms of the statute*, imposing such tax, to say what is *the specific business* or occupation subjected to the tax. In the *Parsons case* in 32 Colo. 221, *the* occupation taxed is "the liquor business." In the *Denver City Ry. case* in 21 Colo. 350, *the* business taxed is *the* business of operating *vehicles upon the public highway for hire*. In the *Kiowa County case*, 21 Colo. 185, *the* business taxed was *the* business of *stock-grazing*.

The same is true of occupation or business taxes laid upon attorneys at law, hotel keepers, auctioneers, peddlers, hackmen, etc. An alphabetical list of the occupations upon which business taxes are "customarily" imposed is set out somewhat at large in *2 Cooley on Taxation*, (3rd Ed.) pp. 1102 *et seq.*

In every instance of such a tax law, the court or the reader is able to point out, either from the terms of the statute itself, or by fair and legal inference therefrom,—what is *the precise business* or occupation subjected to the tax. A statute, which would attempt to provide in general terms that a person should not engage in any business whatever, nor any attempt to earn a livelihood, without being subject to a tax, would not for one instant receive the endorsement of the courts. While it seems to be now well settled law that a State may at its election select out any business or occupation and impose an occupation tax upon that "particular" business, nevertheless a statute, which should say generally that any and every vocation or means of livelihood to which any person should direct his energies, should, without further specification, be subject to a tax, would be unheard of. But, if such a law were passed and could be upheld, it would not be upon the ground that it was "a business or occupation tax," but upon the ground that it was a tax upon the abstract and incorporeal "privilege" or "power" *to do business;* and as such it would, under the Act of 1902, come under the classification of *intangible property*, and such a tax, if it could be upheld, would be under such act "a property tax."

Take now the particular provisions of this statute, and formulate the question, "what is *the* busi-

ness or occupation attempted to be subjected to taxation by these provisions?" Answer would be absolutely impossible. Since corporations, after having received the franchise *to be* and the franchise *to do* business in a particular jurisdiction, may engage in *any* business that can be conceived of, it is apparent that Sec. 64-6 do not *point out* any "particular business" or occupation as the subject of the so-called "license tax" provided for.

Is it *the* business or occupation of the smelting and refining metalliferous ores that is intended to be taxed by these sections of the Act? The statute does not say so. There is nothing in the Act to indicate such an intent. If the next Colorado legislature should see fit to place a specific occupation tax on the smelting business, plaintiff in error would not be allowed to escape the payment of such tax upon the claim that the statute now under consideration imposes a business tax on smelting.

Is it the business of selling liquor? Is it the business of merchandising or of transportation for hire, or any other one of the multitudinous businesses and occupations in which persons, individual or corporate, engage?

Since, then, these particular provisions of the statute do not point out, either expressly or by any possibility of inference, the specific enterprises or occupations upon which it is intended to impose an additional burden for revenue purposes, how can it be said that this is a business or occupation tax? *A business* or occupation is certainly distinct from the *property*, which is used in that business or occupation. It is also distinct from the powers and privileges, which enable a person to do *the* business or to

engage in the occupation. We say, therefore, with the utmost confidence, that no statute can be said to impose "a business or occupation tax," *unless the particular business or occupation to be taxed can be ascertained from the language of the statute itself.*

We humbly and respectfully suggest that the Colorado Court, in reaching the "1" conclusion, stated in its opinion, confused the franchise *to be* a corporation and the right and privilege *to do* business in the State of Colorado, with *the* business or occupation in which the fact and right *to be*, and the power and privilege *to do* business, are exercised.

By the express words of the statute, this tax is imposed "as a condition precedent" to "the right to do business within the limits of the State." The burden imposed is not upon the particular or specific *business* engaged in, but upon the *right* or privilege of engaging in "business" at all.

At page 18, opposing counsel says:

> "The attempt of counsel to reduce the franchise 'to do' of a corporation, the identity with the business in which it is engaged is not convincing."

Most true:—"The attempt * * * is not convincing" because *no such attempt has been made* by counsel for the plaintiff in error. On the contrary, our intention and strenuous endeavor all along has been to call attention to and make clear the radical distinction between *the right* to do business and "*the* business" engaged in. The befuddling, we respectfully insist, is by opposing counsel, who starts out by saying distinctly and unequivocally (p. 11):

"This tax is undoubtedly assessed for the privilege of carrying on business;" and then devotes all the residue of his brief in an attempt to demonstrate that it is a tax upon "the particular business" which is engaged in by the party in whom said right or privilege inheres.

At page 16, opposing counsel says:

> "A consideration of the language of those statutes (Secs. 64 and 65) does not sustain the view taken by plaintiff in error. The language of the statute is that the tax is collectible as *a condition precedent* to its *right* to do any business within the limits of this State, and the penalty is a forfeiture of *this right* to do business until the tax is paid."

Note how plain and unambiguous is this language: "The tax is collectible as a condition precedent to its right to do any business, etc." It hardly seems possible for any two reasonably intelligent and fair minds to place a different construction upon such language, and if the Honorable Attorney General had stopped there, or had adhered to this declaration, we should have heartily said: "True, Oh King," but his very next sentence is: "Evidently the legislature had in mind the *concrete* business in which the corporation is engaged."

Possessing this rare faculty for reading the legislative mind—probably the most difficult and uncertain feat of mind-reading that ever was or can be attempted—will our distinguished brother, disregarding for the time the present case and the specific

business of the plaintiff in error and looking entirely to the statute, tell us what is the exact "concrete business," occupation, trade, avocation, calling or enterprise designated by the statute under discussion? Unless he can do so, then his assertion that this is a tax upon "the concrete business in which the corporation is engaged" is unsupported and he must fall back upon his previous admissions that: "This tax is undoubtedly assessed for the privilege of carrying on business;" (p. 11) "This right to do business is a franchise or power," (p. 15) and it thus becomes a *quod est demonstrandum* that the real subject of this attempted tax is "the abstract power acquired by the filing of the charter," (p. 16) accompanied by a compliance with the laws in force at that time, (p. 15).

Plaintiff in error most emphatically asserts that it does not deny, and never has denied, the right and the power of a sovereign State to impose an *occupation tax* or business tax upon any "trades, occupations, professions or business" which the law-making power may select *and sufficiently designate* as the subject of an occupation tax. Our sole and only contention upon the point under discussion is that it is patent, from the language of this statute, from the statements, admissions and assertions of the Colorado Supreme Court and of its attorney general, that the exaction contemplated by these statutory provisions is not an occupation tax. It is not a tax upon a "concrete," "particular," specific *business* or occupation; but it is a burden, under the name of a "license tax," imposed upon the abstract and general *right* "to do business as a corporation."

The brief for defendant in error says (p. 18):

> "Trades, occupations, professions and business are well-recognized subjects of taxation."

Most true as a general proposition. And the legislature has only to select and designate "the" "particular" or "concrete" "trades, occupations, professions and business" which shall be the subjects of taxation. In regard to some specific occupations and businesses it has been thus explicit in this very same "Revenue" Act of 1902. (See Appendix subjoined hereto.)

A few lines farther on it is said in this brief:

> "A natural person has the right 'to be and to do,' but in the case of corporations these attributes are conferred."

This is an attempted distinction predicated upon a wrong, or at least a confused, assumption. The real distinction is not in the "attributes conferred," but in *the conferring power*. A *natural* person has the right to be and the abstract right to do business as a gift from the Divine Creator; attributes which, by natural law and all Anglo Saxon constitutions, the law-making power of the civil government is prohibited from taking away, except as a punishment for wrong-doing or perhaps under overwhelming public necessity. The same attributes are conferred upon artificial persons *by human law;* but when once conferred, natural persons and artificial persons are upon identically the same footing, so far as concerns the protection of those attributes. In other words,

these "attributes," when conferred, are the same for artificial as for natural persons, and each is equally entitled to have their exercise protected. But a natural person cannot claim the right to exercise his inalienable right "to be" and "to do business" in any "particular," "concrete" or specific occupation or business; and, therefore, if the taxing power chooses to impose an occupation or business tax upon certain particular and specified occupations or avocations, the natural person affected has no ground for complaint. The same law applies to an artificial being when the attributes to be and to do have once been conferred upon it. As opposing counsel well says (p. 18):

> "When the power 'to do' of either a corporation or an individual is exerted in a specific business, the latter is taxable."

True, indeed; but we would add, and will later on demonstrate from authority, that there must be no discrimination between the two when engaged in the same identical "specific business."

On page 19 opposing counsel says:

> "The power of a corporation 'to do' differs from the same power in natural persons in respect that the charter defines what corporations may do."

That is, in natural persons it is the gift of natural or divine law, while in artificial persons it is the gift of human law.

Opposing counsel then says:

> "With this difference, *the powers are alike in natural and artificial persons.* But when either puts the power in execution by starting any particular business, the latter is a distinct subject of taxation under Sections 64 and 69 inclusive."

The first sentence of this quotation is absolutely correct; the latter as absolutely erroneous,—owing, evidently, to a misconception and misapplication of the term "subject of taxation." Neither a natural nor an artificial person can be "a subject of taxation." They are *tax-payers;* and the *subject* of taxation is some objective thing, tangible or intangible, which tax-paying "persons" possess or enjoy. In the statutory provisions under discussion, the corporation is not "the subject of taxation;" that must be a thing, corporeal or incorporeal, which the corporation possesses or enjoys. In this instance it is, according to plaintiff in error, the abstract or general *right* "to do business as a corporation;" or, according to the Colorado Supreme Court and the defendant in error, it is "*the* particular," "the concrete" business or occupation in which the corporation is engaged;—that is, in the present case, the occupation or business of smelting and refining metalliferous ores. The error in the last sentence of the above quotation is that it confounds the *tax-payer* with the "subject of taxation," and this brings us naturally to the subject of classification for purposes of taxation, to which the brief for defendant in error devotes considerable time and space.

At page 12 it is rightly said:

> "Double taxation of property is not permissible in Colorado. Bd. of County Comrs. v. Wilson, 15 Colo. 90, 96."

And at page 20, defendant in error quotes Sec. 3, Art. 10 of the Colorado Constitution, requiring that: "all taxes shall be uniform upon the same class of subjects within the limits of the authority levying the tax," and comments: "the limitation contained in this section requires the tax to be uniform only on the same class of subjects; for instance, all mining property might be taxed in one manner and railroad property in another, and personal property in still a different way, etc."

This is all true and in accordance with the universal announcement of authority, but it is quite distinct from the claim which the defendant in error now makes, to-wit: that the taxing power may for purposes of discrimination *classify the tax-payers* and impose *a different tax* upon the *same subject* of taxation. For instance, it may be conceded for the purposes of this argument, that the legislature might, if it chose, select, and by enactment designate, the smelting and refining business as the subject of special taxation by way of "an occupation tax," but it could not say that persons of Anglo Saxon descent, or the residents of Denver, should pay one tax; persons of Romaic descent, or the residents of Pueblo, another tax; and persons of Oriental or African descent, or residents of Leadville, still another tax, —upon the same identical "subject of taxation," to-wit: the smelting and refining business. This would not be classification of the *subjects* of taxation, but

be attempted classification of *tax-payers* possessing or enjoying the same identical *subject;*—a kind of classification which the laws have never recognized nor permitted.

In like manner, while it may be entirely within the power of the Colorado legislature to impose a specific business or occupation tax upon the smelting and refining of metalliferous ores, it is not within the power of the legislature to classify the tax-payers who may be engaged in that same identical business, and say that tax-payers who are *natural persons* shall pay no "occupation tax" at all, but that tax-payers who are *artificial persons* shall pay such a tax upon the same identical occupation. Nor can it say that artificial persons, who are *domestic corporations* shall pay only "two cents per thousand" of the capital invested; and artificial persons who happen to be *foreign corporations* shall pay "four cents per thousand,"—upon the same identical *subject* of taxation. In other words, it cannot make the personality of the tax-payer, and not the character of the subject of taxation, the basis of classification.

If, then, it were conceded that the statutory provisions under discussion impose "a business or occupation tax," as held by the Colorado Supreme Court, the result would be that any natural person or individual can engage in the smelting and refining business in the State of Colorado absolutely free from this tax, while artificial persons must pay an occupation tax upon the same identical business; that domestic corporations pay one tax on *the* occupation, while foreign corporations, after the State has invited and received them within her jurisdiction, and for a valuable consideration and agreed price, con-

ferred upon them the same privileges and powers as her domestic corporations enjoy,—must pay twice as heavy a tax upon the same identical occupation. The authorities are uniform and unanimous that while occupation taxes are not required to be uniform on different occupations or subjects of taxation, yet they must be uniform upon all persons engaged in the same occupation. For instance, a natural person engaging in the liquor traffic must pay a special license or occupation tax, and an artificial person engaging in the same business is taxed at the same identical rate. And even in this discountenanced occupation,—tolerated but not approved,—no case can be found in which a tax was upheld where there was a discrimination predicated upon *the personality* of the tax payer.

Although the impossibility of perfect uniformity in general of taxation is well recognized, it is undoubtedly the law that occupation taxes *must be uniform among themselves*. Under the subject of "occupation taxes" the law is thus laid down in *21 Am. & Eng. Ency. of Law*, (2nd Ed.), pp. 802-3:

> "Most of the state constitutions provide that taxes shall be equal and uniform, but it is well settled that such provisions have reference primarily to property taxes and do not apply *in their full force* to business taxes or licenses. * * *
>
> "The requirement of uniformity, and equality *does apply to business taxes*, however, to the extent that the same tax must be imposed upon all persons belonging to a given class. * * * A tax which is the

same upon all persons who belong to a class is sufficiently uniform and equal, but one which exempts certain members of a class or discriminates between different members of the same class is invalid."

And again (p. 777):

"This power of taxation, however, is necessarily limited to subjects within the jurisdiction of the power levying the tax, and a state cannot tax persons residing within its borders on account of business which they carry on beyond its jurisdiction; *nor can it discriminate against non-residents* or against goods manufactured or produced in another state."

In *2 Cooley on Taxation*, (2nd Ed.), 1100, it is said:

"It is generally held that occupation taxes must be uniform upon the same class of subjects."

Pullman P. C. Co. v. State, 64 Tex. 274, 280.

Foster v. Pincher, 4 Wyo. 494; 25 Pac. 472, 475.

Gould v. The Mayor, 55 Ga. 678, 682-3.

City v. Bieler, 138 Ind. 30; 36 N. E. 854, 860.

Kiowa Co. v. Dunn, 21 Colo. 185.

Furthermore, it is undoubtedly the law that, while classification for purposes of taxation is per-

missible, and that uniformity in a particular class is sufficient compliance with the constitutional provision, yet it is also true that such *classification* cannot be arbitrarily made, but must have a reasonable foundation.

21 Am. & Eng. Ency. Law, (2nd Ed.), 804.

Magoun v. Illinois, 170 U. S. 283.

If the tax, provided for by these sections, is "an occupation tax," then, in order to be uniform, it would have to be imposed *alike upon all engaging in the same occupation*, and all would have to be taxed in the same way, and at the same rate. If exemptions are made in favor of any, the same exemption must inure to the benefit of all.

Let us, then, call attention to the lack of uniformity, both as to the rate of the tax and as to the classification of the persons who shall pay it: And let us take as a basis of this analysis *the smelting business*.

a. All natural persons or unincorporated associations, irrespective of residence or citizenship, are *wholly exempt* from this tax.

b. All domestic corporations having a capital of less than $25,000 are *wholly exempt*.

c. Domestic corporations, with a capital stock of $25,000 or more, are charged "two cents *upon* each one thousand dollars of capital," without exempting any portion of their stock.

d. Foreign corporations are, without exemption, charged with "four cents *upon* each one thousand dollars of capital."

Here, therefore, there is a lack of uniformity, (1) between natural persons or unincorporated associations on the one hand, and corporations on the other, to the detriment of the latter; (2) between domestic corporations having $24,999.99 or less of capital stock and those having a capital stock of $25,000 or over,—in order to make this classification uniform and reasonable the law would require that corporations having $25,000 or more of capital stock should be exempted up to $24,999.99; (3) Again, a distinction is made between domestic corporations and foreign corporations. And there is no "reasonable basis" apparent for this difference of classification.

The inequity of this statute is apparent even if we confine ourselves entirely to the non-resident and so-called foreign persons. A New York capitalist,—say, for instance, John D. Rockefeller, or M. Guggenheim's Sons, – may carry on a smelting business in Colorado with a capital of $100,000,000 without paying one cent of taxation under these particular provisions, while appellant, coming in with identically the same amount of capitalization and engaging in identically the same business, must pay an annual tax of $4,000.

As the legislature is supreme as to the rate or amount of the tax, and may change it at will, the effect of such a tax would be in many instances to *entirely exclude* foreign corporations (and domestic corporations, too, if their capitalization be $25,000 or over) from a particular business; or, in any event to add to the other expenses of the business the sum of $4,000, not imposed upon their competitors,—which might, and in many instances would, make it

impossible for such a corporation to enter into competition with an individual, an unincorporated association, or an exempted corporation, engaged in identically the same business and investing therein identically the same sum.

In *1 Cooley on Taxation*, (3d Ed.) 37, speaking of "Taxes on corporate franchises," the text writer says:

> "A tax on a corporate franchise may or may not be just or politic. If the business is one of which corporations have a monopoly, a tax on their franchises, however heavy, would not be burdensome, because the result would only be to add to the cost of whatever the corporations supply to the public, so that the tax would really be paid by the community at large. If, on the other hand, the business is one *open to free competition* between corporations and individuals and in respect to which corporations would enjoy no special privileges or advantages, a tax on the privilege of conducting the business under a corporate organization would be *wholly unreasonable and unjust* because it would give individuals and partnerships an advantage in competition; and their competition, keeping down prices, would prevent corporations from indirectly collecting any portion of the tax from the public and leave them to bear the whole burden of a demand which, under such circumstances, *must prove ruinous*. While, therefore, a tax on the corporate franchises of banks of issue, which

> are not subject of competition, might be entirely just, one on the corporate organization of a trading company, *with which every individual might compete*, would usually be wholly unjust, and, if continued, must result in the abandonment of a business which, under such circumstances, would be carried on at a ruinous disadvantage."

If this be true, as it undoubtedly is, of a tax upon corporate *franchises and privileges*, how much more true is it, that in *addition to such discrimination against the corporation* in the general property taxes, there is an additional special tax laid upon *the occupation* itself, while individuals or unincorporated associations engaging in the same business are entirely *free from each and both of said taxes*,—"the occupation tax" as well as "the property tax" on the corporate *franchises*.

Pages 21-8 of the brief for defendant in error are devoted to a citation of, or quotation from, a number of authorities, many of them decisions of this Honorable Court. Time and space does not permit us to comment upon these cases separately to distinguish them from the case at bar. We shall therefore only take the first as a sample of the pertinency of all, and remark that, accepting each and every one of those cases to be the law upon the point involved in each, not one of them conflicts with the contention of the plaintiff in error in the case at bar, nor supports the holding of the Colorado Supreme Court or the contention of defendant in error that the exaction under consideration is an occupation tax, that the law of uniformity in taxation does not apply.

The People v. Home Ins. Co., 92 N. Y. 328, was a case arising out of the contention of the insurance company that the State was not authorized to impose a tax upon the corporate "franchises." In the syllabus it is said:

> "The tax upon corporations imposed by said act are taxes upon franchises, not upon property, etc."

This could not be said *under the Colorado statute*, by which *franchises* are expressly made *property* and are subjected to taxation *as such*, and in like manner as other *property* is taxed.

It is also worthy of note that the New York court in upholding the validity of this franchise tax states as one of the grounds, showing the legality and justice of such a method of taxation, that said franchise tax, is made *in lieu of* the property tax upon the same subject. It is further said:

> (p. 339) "The statutes in question left the corporation still subject to the payment of local taxation (citation) always constituting the great bulk of taxation in the State, and attempted by a new system to collect only so much of the burdens laid upon them as annuity exclusively to the use of the State by tax upon their franchise alone. They were *expressly exempted from the customary tax* laid for state purposes upon their property by the general law and thus secured some compensation for this franchise tax by a partial exemption from the usual property tax."

And

> (p. 340) "The act further provides that such corporations shall be exempted from all further taxation for state purposes except upon their real property."

Thus it is seen that said decision was reached by the New York court expressly upon the ground that franchises generally under the New York statutes were not "property;" and further that the imposition burden placed upon the franchise was compensated for, and rendered just, by the fact that the company was *exempted* from other taxation.

Then, after commenting upon sundry authorities, the New York court says again:

> (p. 344) "Applying the test derived from these authorities, it seems conclusively established that the act under which this tax was levied must be held to impose *a franchise*, and not a property tax, etc."

And further (p. 348):

> "It must be borne in mind that this tax is a fractional tax for which *an equivalent property tax has been surrendered* and thereby substantial *equality of taxation* may be presumed to have been produced even as between individuals and the corporations taxed."

It is thus apparent that the New York court could not and would not have arrived at the conclusions, upon which that decision was rendered, under *such a statute as that now prevailing in Colorado*,

whereby the corporate franchises are expressly made *property*, taxed as *property*, and no exemption whatever from general property taxes is made in its favor.

When this case came to the U. S. Supreme Court (134 U. S. 594) the principal, and practically only, question considered—the other questions discussed being incidental to and for the purpose of arriving at a proper conclusion upon that leading question,—was whether the tax imposed by the New York statute was laid upon the capital stock or upon the corporate franchise; and all that was said by this Honorable Court in the course of that decision must be interpreted in the light of the exact question which the Court was then considering and determining. Most of the opinion is devoted to comment upon sundry authorities; and when the Court came to its conclusion (p. 606) on the particular case under consideration, it said:

> "In this case, we hold, as well upon general principles, as upon the authority of the first two cases cited from 6th Wallace, that the tax for which the suit is brought, is not a tax on the capital stock or property of the company, but upon its corporate *franchise*, and is not therefore subject to the objection stated by counsel, because a portion of its capital stock is invested in securities of the United States."

Bearing in mind, as above stated, that, except in special instances, *franchises* are, under the New York law, not *property*, while in Colorado they are made property and fully subjected to taxation as

such,—it is hard to conceive how this decision is a controlling, or even pertinent, precedent in the case at bar. It will be noted that in the New York case the Court holds that the capital stock was not taxed as such, but was simply referred to as a standard of measurement to ascertain the amount of the tax in each particular instance. By reference to the provisions of the Colorado Act of 1902, which appear in the appendixes to the several briefs herein, it will be seen that the capital stock of corporations is by that Act repeatedly referred to and required to be taken into consideration in the assessment of the various kinds of taxes against corporations; and we think that an examination of this "Revenue" statute will disclose that, outside of the provisions involved in this particular case, the capital stock of a corporation is at least twice required to be referred to and taken into estimation for the purpose of other kinds of taxes which are imposed by said Act.

On page 606 of the Home Insurance case this defining the application of the Fourteenth Amendment, says:

> "It is conceded that corporations are persons within the meaning of this amendment. It has been so decided by this Court, 125 U. S., 181. But the Amendment does not prevent the classification *of property* for taxation—subjecting one kind of *property* to one rate of taxation and another kind of *property* to a different rate—distinguishing between franchises, licenses and privileges, and visible and tangible property, and between real and personal property."

Here is sufficient recognition by this Honorable Court of the correctness of the rule which we have above stated and contended for, to-wit: that classification for the purposes of taxation must be "classification of property," not classification of *tax-payers*. It must be classification of the *subjects* of taxation and not classification by the *personality* of the different tax-payers, who are possessing or enjoying the same identical kind of property or subject of taxation.

This Honorable Court further says:

> "And when such legislation applies to artificial bodies, it is not open to objection, *if all such bodies are treated alike under similar circumstances and conditions* in respect to the privileges conferred upon them and the liabilities to which they are subjected."

We respectfully submit that—although there is such a radical difference between the New York statute under consideration in the *Home Ins. case* and the Colorado statute under consideration in the case at bar, that it can hardly be said that the *Home Ins. case* is pertinent at all to the case at bar,—yet clear, legal and logical corollaries are to be inferred from propositions stated in that case, which strongly support the propositions relied upon by the plaintiff in error in the case at bar.

After a careful study of the cases cited by defendant in error, and especially those listed on pages 27-8, and 74, we submit that upon a fair examination and analysis of each case, in the light of the particular facts and questions presented in each, none of

those cases militate against the contentions relied upon by the plaintiff in error, nor support the interpretation put upon the Colorado statutory provisions now under consideration, by Colorado's Supreme Court and by its distinguished Attorney General; especially when sections 64-6 are studied and interpeted in connection with other tax imposing provisions of the same Act.

This brief has already exceeded the space to which at the beginning we hoped to confine it; and to take up the residue of the brief of defendant in error in detail would be impossible in the limited time at our disposal. We think that it would also be unnecessary: For as to all other contentions made in said brief, the reply is either so perfectly patent as to need no formulation; or the contentions of plaintiff in error upon the points have been sufficiently stated in our principal brief.

For instance, it is not necessary to occupy time and space to define unto this Court the extent of the conclusiveness of the Colorado decision or to demonstrate that this Court is not precluded by the finding of the Colorado Court, that the provisions of the Federal Constitution are not infringed by the Colorado statutory provisions under consideration. If, as opposing counsel contends, the construction given by the Colorado Court to the Federal Constitution were conclusive and binding upon this Court, then there would be no case in which this court had jurisdiction to review a finding of the State Court upon a question involving a construction of the Federal Constitution.

Nor need we go into the question "Exemption from taxation:" For notwithstanding the positive statement to the contrary by the Colorado Supreme Court and by opposing counsel, there is not and never has been any claim or suggestion of a claim by plaintiff in error to an exemption from any legal and valid tax.

It is apparent, upon reason and authority, as well as upon the express declarations and admissions of the Colorado Supreme Court and of counsel for defendant in error, that this proposed tax cannot be sustained, unless it is strictly *an occupation or business tax.* It is conceded that, as a "property tax," a "franchise tax," a "privilege tax," or as a *bonus* or "conventional price" for the privilege to do business as a corporation in Colorado, this tax cannot be sustained. If, therefore, the Colorado Court was mistaken and in error in saying that this was an occupation tax—"a tax upon *the* business of the corporation,"—then the conclusion it arrived at was erroneous and its decision should be reversed.

Respectfully submitted,

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APPENDIX.

Sec. 18 of the Act of March 22, 1902, is as follows:

"Every person, company or corporation selling any malt, vinous or spirituous liquors shall, in addition to other license fee exacted by law, or by the ordinances of any municipality, pay to the State of Colorado an annual license fee of twenty-five dollars per annum in advance, for each and every saloon, restaurant, hotel, club, drug store, liquor store or other place where any said liquor shall be sold. The license aforesaid shall be issued by the treasurer of state, to whom the license fee aforesaid shall be paid; the said license to specify the date of issuance, the period which it covers, the name of the licensee, the place licensed, and that such license is issued subject to the ordinances of the city or town and to the regulations of the county on the subject, in which the place so licensed is located. Said license shall be conspicuously exposed at all times in the place thereby licensed; and all constables, sheriffs and police officers shall see to it that every such person, company and corporation within his jurisdiction has procured such license. Neither the county authorities of any county, nor the officers of

any municipality, shall issue, transfer or renew any license to sell any malt, vinous or spirituous liquors until such person, company or corporation shall in the first instance produce a state license, as provided herein, covering the whole period for which a license or a renewal or transfer thereof is asked from any county or municipality; PROVIDED, That, the said license may be transferable to successors in business.